BSN Commercial Bank (M) Bhd v Pentadbir Tanah Daerah, Mersing

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24–546 OF 1996
ABDUL MALIK ISHAK J
5 MAY 1997

Land Law *— Acquisition of land — Compensation — Apportionment of — Concession between parties to apportion compensation — Whether compensation should be apportioned between chargor and chargee — Compensation less than amount due under charge — Indivisibility of charge*

The plaintiff gave a loan to a third party ('the borrower') which was secured by way of a charge made by one Mr A Rahman Jaafar ('the chargor') in favour of the plaintiff on two pieces of land ('the properties'). The borrower defaulted in the payment of the amount outstanding on the loan. The chargor failed to remedy the breach. Subsequently, the properties were ordered to be sold by a public auction.

In July 1993, the properties were acquired by government. It was in evidence that as at 24 August 1993, the outstanding debt was RM672,924.09. The defendant, being the collector of land revenue ('the collector'), held an enquiry which was attended by the plaintiff and the chargor and ordered that a sum of RM143,750 be awarded as compensation ('the compensation sum') in respect of the properties. The collector contended that at the enquiry, the plaintiff's solicitor agreed that the plaintiff, as the chargee, was to be paid RM52,000 and the balance of RM91,750 to the chargor. The plaintiff disputed this and said that in the face of the colossal debt, they would not have agreed to the apportionment.

The plaintiff applied to the court for declarations, inter alia, that: (i) the whole of the compensation sum was due and payable to the plaintiff being that the amount due under the charge was far greater; (ii) the payment by the collector to the chargor was wrongful and that the plaintiff being the chargee was entitled to receive the whole sum; and (iii) the order made by the collector to split the whole sum be set aside. The issue was whether the whole of the compensation sum should be paid to the plaintiff in the light of the alleged concession by the plaintiff's solicitor.

Held, dismissing the application with costs:

At the enquiry, it was recorded by the collector that the plaintiff's solicitor had agreed that RM52,000 should go to the plaintiff and the balance to the chargor. No mention was made to the collector as to the colossal debt owing to the plaintiff. No doubt a charge is indivisible and the total compensation awarded should rightly go to the chargee, but in the face of the concession by the plaintiff's solicitor at the enquiry, the collector had to take the face value of the consent by the

A solicitor. Therefore, on the facts of this case, estoppel would be invoked against the plaintiff and rendered the plaintiff bound by whatever transpired at the enquiry (see pp 300I, 303G, 304D and 305A–B); *Chung Khiaw Bank Ltd v The Government of the State of Sabah & Ors* [1994] 2 MLJ 193 distinguished.

B **[Bahasa Malaysia summary**

Plaintif telah memberi pinjaman kepada pihak ketiga ('peminjam') yang dijamin dengan cara gadaian yang dibuat oleh seorang bernama En A Rahman Jaafar ('penggadai') memihak kepada plaintif ke atas dua bidang tanah ('hartanah tersebut'). Peminjam ingkar dalam C bayaran jumlah pinjaman yang tertunggak. Penggadai gagal untuk memulihkan pelanggaran itu. Kemudiannya, hartanah tersebut diperintahkan untuk dijual dengan cara lelong awam.

Pada bulan Julai 1993, hartanah tersebut diambil oleh kerajaan. Terdapat keterangan bahawa pada 24 Ogos 1993, hutang yang D tertunggak adalah RM672,924.09. Defendan, yang merupakan pemungut hasil tanah ('pemungut'), mengadakan penyiasatan yang dihadiri oleh plaintif dan penggadai dan memerintahkan bahawa sejumlah RM143,750 diawardkan sebagai pampasan ('jumlah pampasan') berkenaan dengan hartanah tersebut. Pemungut menegaskan bahawa pada masa penyiasatan, peguamcara plaintif E bersetuju bahawa plaintif, sebagai penerima gadaian, hendaklah dibayar RM52,000 dan baki sebanyak RM91,750 kepada penggadai. Plaintif mempertikaikan kenyataan ini dan mengatakan bahawa memandangkan hutang yang sangat banyak, mereka tidak mungkin akan bersetuju dengan pembahagian itu.

F Plaintif memohon kepada mahkamah untuk deklarasi-deklarasi, antara lain, bahawa: (i) kesemua jumlah pampasan adalah terhutang dan perlu dibayar kepada plaintif kerana jumlah yang terhutang di bawah gadaian itu adalah jauh lebih besar; (ii) bayaran oleh pemungut kepada penggadai adalah salah dan bahawa plaintif yang merupakan penerima gadaian berhak untuk menerima kesemua jumlah; dan G (iii) perintah yang dibuat oleh pemungut untuk membahagikan kesemua jumlah diketepikan. Isu adalah sama ada kesemua jumlah pampasan patut dibayar kepada plaintif memandangkan konsesi yang dikatakan oleh peguamcara plaintif.

H **Diputuskan**, menolak permohonan dengan kos:

Pada masa siasatan, adalah direkodkan oleh pemungut bahawa peguamcara plaintif telah bersetuju bahawa RM52,000 patut dibayar kepada plaintif dan bakinya kepada penggadai. Tiada sebutan dibuat kepada pemungut berkenaan dengan hutang yang sangat banyak I yang terhutang kepada plaintif. Adalah tanpa keraguan bahawa gadaian tidak boleh dibahagikan dan jumlah pampasan yang diawardkan sepatutnya dibayar kepada penggadai, tetapi memandangkan konsesi oleh peguamcara plaintif pada masa siasatan, pemungut perlu mengambil nilai muka persetujuan oleh peguamcara. Oleh itu, atas

fakta-fakta kes ini, estopel akan digunakan terhadap plaintif dan menyebabkan plaintif terikat oleh apa-apa yang berlaku pada masa siasatan (lihat ms 300I, 303G, 304D dan 305A–B); *Chung Khiaw Bank Ltd v The Government of the State of Sabah & Ors* [1994] 2 MLJ 193 dibeza.] A

Notes B

For cases on acquisition of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1164–1309.

Cases referred to C

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287 (refd)

All persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v Punca Klasik Sdn Bhd [1996] 4 MLJ 533 (refd) D

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Asst Development Officer Trombay v Tayaballi Allibhoy Bohori AIR 1933 Bom 361 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd) E

Chung Khiaw Bank Ltd v The Government of the State of Sabah & Ors [1994] 2 MLJ 193 (distd)

Close v Steel Co of Wales Ltd [1962] AC 367; [1961] 2 All ER 953 (refd)

Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536 (refd) F

Lancashire and Yorkshire Rly Co v Highley [1917] AC 352 (refd)

Lane v Willis [1972] 1 All ER 430; [1972] 1 WLR 326 (refd)

Miller-Mead v Minister of Housing and Local Government & Anor [1963] 2 QB 196; [1963] 1 All ER 459 (refd)

Moorgate Mercantile Co Ltd v Twitchings [1976] 1 QB 225 (refd) G

Newsholme Bros v Road Transport and General Insurance Co Ltd [1929] 2 KB 356 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Ng Kam Loon & Ors v Director of Public Works Department, Johore & Anor [1990] 2 MLJ 229 (refd) H

Osborne v Rowlett (1879–80) 13 Ch D 774 (refd)

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332 (refd)

Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (refd)

Pyx Granite Co Ltd v Ministry of Housing & Local Government & Ors [1960] AC 260; [1959] 3 All ER 1 (refd) I

Qualcast (Wolverhampton) Ltd v Haynes [1959] AC 743; [1959] 2 All ER 38 (refd)

Quinn v Leathem [1901] AC 495 (refd)

Rondel v Worsley [1969] 1 AC 191 (refd)
S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204 (refd)
Saffron Walden Second Benefit Building Society v Rayner (1880) 14 Ch D 406 (refd)
Saif Ali & Anor v Sidney Mitchell & Co (A Firm) & Ors [1980] AC 198 (refd)
Swinfen v Swinfen (1857) 24 Beav 549 (refd)
Tan Keat Seng Kitson v Kerajaan Malaysia [1996] 1 MLJ 454 (refd)
Tan Sri Hj Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177 (refd)
Wild v Simpson [1919] 2 KB 544 (refd)
Wright & Anor v Pepin [1954] 2 All ER 52 (refd)
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 224 (refd)

Legislation referred to

Federal Constitution art 13
Land Acquisition Act 1960 ss 12, 12(1), 13, 14, 16, 37(1)(a), (d), 38(1), 44(2), 47(1), (2), 48, First Schedule
National Land Code 1965 ss 254, 260, 263
Penal Code (FMS Cap 45) ss 175, 176
Rules of the High Court 1980 O 15 r 16

Philip Nainan (*Abdul Rahman Saad & Associates*) for the plaintiff.
Abdul Rashid bin Sudin (Deputy State Legal Adviser, State Legal Adviser's Chambers) for the defendant.

Abdul Malik Ishak J: This was an application by the plaintiff for the following declarations:

(1) A declaration that the whole of the compensation, namely the sum of RM143,750 awarded in Acquisition Proceedings No 15–36 of 1994 in respect of Lots 822 and 829 which were at the time of the award subject to a charge (vide Charge Presentation No 172/77, Vol 3, folio 90 registered at Mersing on 8 August 1977) in favour of the plaintiff is due and payable to the plaintiff being the chargee of the said lots as the amount due under the charge at the time of the award was far greater than the total award of compensation made by the defendant.

(2) A declaration that the payment by the defendant on 4 April 1994 of the sum of RM91,750 out of the total compensation of RM143,750 for the said two lots to the land owner ('the chargor') is wrongful and that the plaintiff being the chargee is entitled to receive the whole of the compensation together with interest thereon from 4 April 1994.

(3) That the order made by the defendant on 24 October 1993 to split the total compensation between the plaintiff and the chargor be set aside and the defendant be and is hereby ordered to pay to the plaintiff the balance of the compensation of RM91,750 together with interest thereon from 4 April 1994.

(4) Such further orders or directions as the honourable court may deem fit to grant. A

Order 15 r 16 of the Rules of the High Court 1980 ('the RHC') states that:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed. B

The case of *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 (CA) lays down a vintage proposition in regard to declaration. It states that the jurisdiction to make a declaration under the rule is not confined to cases in which the plaintiff has a complete and subsisting cause of action. It is now recognized by legal practitioners throughout the country that a declaration can be resorted to in order to ascertain and determine the rights of parties or to determine a point of law or in lieu of certiorari, a declaration would be resorted to when the time to apply for a prerogative order has expired: *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (FC) and *Pyx Granite Co Ltd v Ministry of Housing & Local Government & Ors* [1960] AC 260; [1959] 3 All ER 1 (HL). The headnote to the case of *Tan Sri Hj Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 (FC) carries a passage that merits reproduction. It is this: C D E

> (2) Although it is not necessary for a plaintiff who seeks relief by way of declaratory judgment to show that he has a present cause of action, he must be somebody with such an interest in the subject matter of the action as to justify his seeking relief.

I did say in *Tan Keat Seng Kitson v Kerajaan Malaysia* [1996] 1 MLJ 454 (at p 467) to the following effect, which must surely apply to the present case: F

> An action for a declaration has been given considerable prominence in a number of cases. An action in the nature of a declaration may be begun by writ or by originating summons like the present case. In *Punton v Ministry of Pensions and National Insurance* [1963] 1 WLR 186 especially at p 191, Lord Denning MR succinctly said: G
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> > 'Two test cases by Eric Edward Punton and James Charles Croxford were taken to the insurance commissioner. He gave a considered opinion on 20 September 1961, in writing, determining the cases against each of them. He determined the facts and set them out and then he gave his view of the interpretation of the statute. His order was what is called a "speaking order" and there is no doubt whatever that it could have been reviewed by the High Court by means of a writ of certiorari to see whether it was correct in point of law or not. But the applicants did not follow that procedure. Each of them took out an originating summons in the Queen's Bench Division asking for a declaration. That is a procedure which is now available to overcome many of the difficulties surrounding certiorari.' H I
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> In another part of the judgment in the same case, Lord Denning MR in the same vein, had this to say (at p 192):

> 'Now, when the case is put that way, it seems to me to be a very proper matter for determination by originating summons for a declaration. Indeed, it is a sensible and modern way of approach. When an originating summons is framed so as to raise a distinct and important point of law, there is not the slightest ground for saying that it is frivolous and vexatious. Mr Cumming-Bruce [counsel for the Ministry of Pensions and National Insurance] acknowledged as much in his opening remarks when he said that he did not challenge that the High Court has jurisdiction to make a declaration that the determination of the commissioner was bad in law.
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> But the summons is not at present properly framed for the purpose; and when this was pointed out, Mr Gardiner [counsel for the claimants] made an application to amend, to which we were ready to accede. The summons should be amended so as to ask, in effect, for a declaration whether, on the facts found by the commissioner, he came to a correct determination in point of law. On that amendment being made, the jurisdiction of the court will be clear.'

In my judgment, the procedure adopted by the plaintiff in seeking a declaration before this court is beyond reproach. It was grounded on the same format as adverted to by Lord Denning MR in the *Punton*'s case ... .

Now to the facts taken principally from the several affidavits filed therein. On 19 July 1977, the plaintiff loaned a sum of RM78,000 ('the loan') to a company known as Syarikat Sri Chantra ('the borrower'). As security for the repayment of the loan, one Mr A Rahman bin Jaafar ('the chargor') who was, at the material time, the owner of two properties held under Lot 822 EMR 351 and Lot 829 EMR 385, situated at the Mukim of Mersing ('the properties') charged the properties to the plaintiff vide Charge Presentation No 172/77, Vol 3, folio 90 registered at Mersing on 8 August 1977 ('the charge') upon the terms and conditions stated therein together with the annexure to the charge ('the annexure'). On 11 September 1981, the plaintiff issued to the chargor a notice of default as per Form 16D pursuant to s 254 of the National Land Code 1965 ('the NLC') to the effect that the chargor was in breach of one of the conditions of the charge in that the chargor had failed to make payment on demand the sum of RM123,937.20 being the outstanding balance on the account of the borrower as at 30 June 1981 and the chargor was put to notice to remedy the said breach failing which the plaintiff would apply for an order of sale of the properties. On 13 October 1981, the plaintiff made an application pursuant to s 260 of the NLC to the collector in Form 16G for an order for the sale of the properties since the chargor persisted in defaulting in making the necessary payments. On 29 September 1985, the collector ordered pursuant to s 263 of the NLC for the properties to be sold by public auction at the behest of the chargee on 30 October 1985 as reflected in Form 16H and there it was stated that the debt due to the plaintiff as at 29 September 1985 was RM218,245.47. On 30 October 1985, the defendant postponed the sale by public auction of the properties without providing a new auction date. On 3 February 1989, the plaintiff's solicitors by letter requested the defendant to fix a new auction date as the chargor had failed to repay the plaintiff the outstanding loan amount. It was apparent from the said letter that the chargor had requested that the first

auction date, which had been fixed for 30 October 1985, be postponed on the ground that the chargor was endeavouring to repay the plaintiff the outstanding loan amount. On 15 October 1992, the plaintiff's solicitors wrote to the defendant wherein the plaintiff expressed their intention to proceed with the sale of the properties by public auction and that the plaintiff would be forwarding a new valuation report in respect of the properties bearing in mind that after a lapse of seven years from the date of the first auction, the value of the properties would have changed. By letter dated 14 January 1993, the firm of valuers engaged by the plaintiff, namely, Messrs Param & Associates wrote to the plaintiff and conveyed the message that the open market value of the properties for purposes of sale by public auction would be RM52,000. On 5 March 1993, the plaintiff's solicitors wrote to the defendant and requested for a new auction date to be fixed on the basis of the valuation report prepared by Messrs Param & Associates which was forwarded to the defendant. The defendant still persisted in refusing to provide a second auction date despite several written requests by the plaintiff's solicitors. A letter dated 16 July 1993 from the plaintiff's solicitors to the defendant requesting for a new auction date was exhibited and marked as 'MN 10'. Surprisingly, on or about July 1993 before any new auction date was fixed by the defendant, the government gave notice to the chargor of its intention to acquire the properties pursuant to the provisions of the Land Acquisition Act 1960 ('the LAA'). It was in evidence that as at 24 August 1993, the outstanding balance owned by the borrower to the plaintiff came up to a staggering amount of RM672,924.09. An enquiry was held by the defendant on 23 and 24 August 1993 under s 12 of the LAA where the defendant ordered that a total sum of RM143,750 be awarded as compensation in respect of the properties. The defendant then proceeded to divide the total award of compensation and ordered that the plaintiff as chargee be paid only RM52,000 out of the total amount of compensation while the balance of RM91,750 to be paid to the chargor as the owner of the properties notwithstanding the defendant's knowledge that at that time there was in existence a charge thereon. Upon the conclusion of the enquiry, the defendant prepared a written award in Form G in pursuance of s 14 of the LAA dated 10 November 1993 and there, out of the total award of compensation of RM143,750, a sum of RM52,000 was awarded to the plaintiff while a sum of RM91,750 was awarded to the chargor. On 10 November 1993, the defendant pursuant to s 16 of the LAA prepared and served on the plaintiff and the chargor each a notice of award and offer of compensation in Form H which reflected the award of RM52,000 and RM91,750 to the plaintiff and the chargor respectively. Broomfield J in *Asst Development Officer Trombay v Tayaballi Allibhoy Bohori* AIR 1933 Bom 361 had this to say in regard to the position of the acquiring officer's award:

> The acquiring officer's award is of course, strictly speaking, not an award at all but an offer. It is based on inquiry and inspection and the officer responsible for it is usually a man of experience and local knowledge. He may take evidence, but he is not bound to do so, and his proceedings are administrative rather than judicial. But if the award is not accepted and the

A matter is taken into court, the proceedings are thence forward judicial in character.

That was an Indian decision decided some 64 years ago. Under s 12(1) of the LAA, an enquiry before the collector (now land administrator) must be an enquiry which must be carried forth fully into the value of the scheduled B land. The collector is required 'as soon as possible thereafter' to assess the amount of compensation which in his opinion is appropriate according to the principles enumerated in the First Schedule to the LAA. In the course of discharging his duties, the collector must under the law listen to all objections submitted by any interested person. Just like a court of law, in conducting an enquiry under s 12 of the LAA, the collector is empowered C under s 13 of the LAA to summon and examine witness and to compel the production and delivery of documents. In my judgment, any person summoned to appear at the enquiry must do so and is legally obliged to attend and in the event of default, the provisions of the Penal Code (FMS Cap 45) particularly ss 175 and 176 would be brought to bear. Richard D Talalla JC (as he then was) in *Ng Kam Loon & Ors v Director of Public Works Department, Johore & Anor* [1990] 2 MLJ 229 observed that (at p 231):

> It is implicit that the inquiry by the collector into the value of the land and the assessment of the amount of compensation which in his opinion is appropriate, pursuant to the provision of s 12, is a function the nature E whereof is judicial; a fortiori as by virtue of sub-s (2) of that section, the collector is required to enquire into the respective interests of all persons claiming compensation or who in his opinion are entitled to compensation in respect of the land in question, and into the objections, if any, by any interested person to the area of the land in question ... .

F Reverting back to the facts, by letter dated 4 October 1993, the plaintiff lodged an objection and filed that objection in Form N dated 1 October 1993 under s 38(1) of the LAA and that objection, inter alia, stated that the plaintiff as chargee was entitled to the whole of the compensation sum. It is interesting to note and highlight the fact that before the acquisition G judge on 2 October 1995, a consent order was agreed and entered into by the parties wherein the defendant was ordered to pay an additional compensation of RM31,250 to the plaintiff with interest at 8%pa in the event that the additional compensation was not paid within a period of three months after service of the consent judgment. It was also ordered that there would not be any order as to costs and the deposit was to be H refunded. It was deposed that the plaintiff's solicitors negotiated at the office of the state legal adviser's chambers and there the terms of the consent judgment was formalized and the parties agreed that the issue of the division of the award by the defendant would be a subject matter of a separate action. This was not disputed by the defendant by way of an I affidavit evidence and, consequently, should be treated as true (*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382, *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332, *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287 and *Wu*

Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 224). Hence the present application. Notwithstanding the fact that this court has jurisdiction to hear this application, it seems strange that the parties did not bring forth the issue of the division of the award as awarded by the defendant at the enquiry to the acquisition judge on 2 October 1995 because that would be the right forum for this issue to be ventilated and resolved. Section 37(1)(a) and (d) of the LAA enables the plaintiff as a person interested in any scheduled land who has accepted payment of the amount of such award under protest as to the sufficiency thereof to make objection as to the amount and apportionment of the compensation. It must be put in the forefront to the effect that the hearing before the acquisition judge must be restrictive in its scope as envisaged under s 44(1) of the LAA. It will be confined and restricted to 'a consideration of the interests of the persons affected by the objection'. Section 44(2) of the LAA proceeds further to say that the acquisition judge is required to consider the interests of all persons interested who have not accepted the award, whether or not those persons have made an objection. Section 47(1) of the LAA enacts that every decision made by the acquisition judge shall be in writing signed by the judge himself. Where the acquisition judge's decision comprises an award of compensation, that decision must specify (see s 47(2) of the LAA):

(a) the amount awarded on account of the market value of the land under section 2(a) of the First Schedule;

(b) the amount, if any, deducted under section 2(b) of the First Schedule;

(c) the amounts, if any, respectively awarded under section 2(c), (d) and (e) of the First Schedule; and

(d) in respect of each such amount, the grounds for awarding or deducting the said amounts.

For these reasons, it should have been ideal that the issue of the division of the award as awarded by the defendant should have been decided by the acquisition judge for he is vested with the judicial authority to award a greater sum beyond the amount actually awarded by the collector and he may direct the collector to pay interest on such excess amount at the rate of 8%pa from the date on which the collector took possession of the land to the date of the payment of such excess to the court or to the person entitled thereto (s 48 of the LAA). In dealing with cases under the LAA, it is salutary to remember the doctrine of *salus populi suprema lex*. It simply means that the interests of the public are paramount and that private interests may in some instances be subordinate to the higher interests of the public. No doubt art 13 of the Federal Constitution abridges the absolute right of ownership of property, yet in some ways it 'ensures the sanctity of private property'. Article 13 of the Federal Constitution provides that:

(1) No person shall be deprived of property save in accordance with the law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

Hashim Yeop Sani J (as he then was) in *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 at p 206 spoke aptly of art 13 of the Federal Constitution in these words:

> ... That clause [art 13(1)] guarantees the right of any person not to be deprived of his property save in accordance with law which simply means that no one can be deprived of his property merely on the orders of the Executive but that he may be deprived of his property only in accordance with law ... .

It was apparent that the plaintiff was unhappy with the splitting of the compensation sum for the properties. It was argued that RM143,750 should go direct to the plaintiff as the chargee. The chargor, it was said, was not entitled to a cent out of the whole of the compensation sum. An argument was also advanced that the defendant had wrongfully split the amount and paid a big portion of it (RM91,750) to the chargor while the chargee bank had a smaller size of the cake at RM52,000. It was said that the whole of the compensation sum was indivisible. In the celebrated case of *Chung Khiaw Bank Ltd v The Government of the State of Sabah & Ors* [1994] 2 MLJ 193, the (then) Supreme Court had occasion to deal with the issue of the splitting of a compensation award. The facts of that case can be distilled from the learned judgment of Mohd Dzaiddin SCJ (now FCJ) and I can do no better than to quote them in extenso particularly at pp 196–197 thereof:

> ... The fourth respondent is the registered owner of seven pieces of property bearing Title Nos CL 115312591, CL 115312608, CL 115313310, CL 115107974, CL 115312644, CL 115313276 and CL 115313294 in Lahad Datu ('the property'), comprising an approximate area of 161.214 acres. By a memorandum of charge executed on 9 August 1968 under Memorial No 92666, he charged the property to the appellant as security for a loan of RM1.4m. As at 31 March 1991, the amount due and owing by him to the appellant was RM5,401,348.57
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> Some time in March 1991, the Government of Sabah compulsorily acquired 4.141 acres of the property for highway construction. On 9 September 1993, the High Court made an award of RM704,915.40 as compensation for the acquired portion and apportioned the said amount by awarding RM567,245.90 to the fourth respondent and RM137,669.50 to the appellant. It is to be noted that the amount to be paid to the appellant was very much less than the outstanding debt due to them under the charge.

His Lordship Mohd Dzaiddin SCJ continued at p 197 of the same judgment in these words:

> The learned judge preferred the above method of apportionment and rejected entirely the appellant's claim that there should not be any apportionment, but instead the whole amount be paid to them ... .

Further down at p 198 of the same judgment, his Lordship Mohd Dzaiddin SCJ continued:

> ... Now, the question before us is: what is the correct principle to follow when apportioning the compensation money between a chargor and chargee? The next question, which is fundamental to this appeal, is whether the

> learned judge erred in principle when he apportioned the compensation money between the fourth respondent and the appellant, instead of awarding the whole amount to the latter. A

At pp 199–198 of the same judgment, his Lordship Mohd Dzaiddin SCJ continued:

> As we have stated earlier, in the instant case, we are dealing with the apportionment between the chargor and chargee. Following the observation in *P Valia Raja v TS Veeraraghava Iyer* AIR 1961 Ker 222 (FB), the primary consideration here is the right and interest of the appellant as chargee of the property. In our opinion, the learned judge was wrong in principle when he applied the general principles of apportionment to a special situation involving a chargor and chargee. In the circumstances of the instant case, the government valuer's formula which is of general application cannot apply to a charged property since a charge is indivisible and the security is attached to the whole property. It follows that until the property is discharged, the interest of the appellant is on the whole property and any proceeds of the sale of the property will attach to the said property. ... Secondly, based on the above consideration, and bearing in mind that the area acquired by the state government was a portion of the property and that the total compensation sum for the acquired portion was very much less than the outstanding loan due to the appellant, it would be inequitable to make any apportionment of the compensation sum as between the parties. The conclusions which we have expressed above are supported by the ratio decidendi in *Topan Das v Jesaram* 17 PR 1907, an authority not only directly on the point in issue but sound in principle ... . B C D E

Finally, his Lordship Mohd Dzaiddin SCJ concluded his judgment at p 200 in these words:

> Therefore, for reasons stated above, we allow this appeal with costs. Accordingly, we set aside the order of the apportionment and direct the whole of the compensation money be paid to the appellant toward part payment of the debt due from the fourth respondent to the appellant under the charge. Deposit of the appeal is refunded to the appellant. F

On the principle of stare decisis, I am bound by the decision of *Chung Khiaw Bank Ltd.* Judicial precedent is an indispensable tool and it is the foundation upon which to decide what is the law and how it should apply to an individual case. It provides a degree of certainty to legal practitioners in the conduct of their affairs. An orderly development of the law will definitely flow from the pen of learned judges. The principle that can be distilled from a judge's decision is an important factor to consider: *Osborne v Rowlett* (1879–80) 13 Ch D 774 at p 785. It is said that judicial authority belongs not to the exact words used nor even to all the reasons given, but rather to the principles accepted and applied as the crucial grounds of the decision: *Close v Steel Co of Wales Ltd* [1962] AC 367; [1961] 2 All ER 953 (HL). It must not be forgotten that every judgment must be viewed in the context of the particular facts proved since they are not intended to be an exposition of the whole law but rather governed and qualified by the particular facts of the case: *Quinn v Leathem* [1901] AC 495 at p 506 (HL) and *Miller-Mead v Minister of Housing and Local Government & Anor* [1963] 2 QB 196 at p 236; [1963] 1 All ER 459 at p 476 (CA). It is a G H I

correct statement of the law to say and I so say without reservations that except as between the parties or their privies, the decisions that revolve on facts are not binding on any other court (*Carnell v Harrison* [1916] 1 Ch 328 at p 331, *Lancashire and Yorkshire Rly Co v Highley* [1917] AC 352 at p 364 (HL), *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356 at p 357 and *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743; [1959] 2 All ER 38 (HL)). Finally, a judge of first instance is not given the liberty nor should that judge say that a recent Court of Appeal decision was wrong: *Lane v Willis* [1972] 1 All ER 430 at p 435; [1972] 1 WLR 326 at p 332 (CA) — more so in the context of the present case, the decision of the highest court in the country. On stare decisis, reference may also be made to the case of *All persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township of Johor Bahru, Johor v Punca Klasik Sdn Bhd* [1996] 4 MLJ 533 especially at p 541.

Applying these principles to the forefront of my mind, I will now proceed to consider *Chung Khiaw Bank Ltd*. Both *Chung Khiaw Bank Ltd* and the present case involved a chargor-chargee situation which culminated in the charged property being acquired by the government. In the present case, the properties were acquired for industrial purposes. A charge simply means that the land of the chargor is encumbered by an obligation to repay. When the chargor defaults, the land will be sold to recoup the amount due. No evidence was adduced in *Chung Khiaw Bank Ltd* as to what transpired at the enquiry under s 12 of the LAA before the collector. In the present case, what transpired before the collector by the name of Muhamad Fuad bin Hj Radzuan was amply set out in exh 'MN12' of encl 2 which was repeated in 'MFR2' of encl 12 and for clarity, it is reproduced hereinunder:

> KETERANGAN PEMILIK TANAH
> EMR 385 LOT 829 dan EMR 351 LOT 822
>
> Tuan tanah yang hadir ialah A Rahman bin Jaafar KP No 0658269. Wakil daripada pemegang gadaian (Bank Buruh Malaysia) ialah Thamil Chelevan a/l Suppiah KP No 5601797. Luas tanah yang terlibat dengan PBT masing-masing seluas 3e Or 13p dan 2e 2r 19p.
>
> Menurut tuan tanah, tanah tersebut telah dibeli pada tahun 1965. Kemudiannya telah dipinjamkan kepada Sri Chantra Sdn Bhd untuk digadaikan kepada Bank Buruh, tetapi tidak dibayar sehingga dikenakan tindakan untuk lelong. Cukai telah dibayar oleh tuan tanah.
>
> Wakil pemegang gadaian memberitahu bahawa pihaknya telah membuat taksiran melalui penilai persendirian daripada Param & Associates. Nilainya adalah seperti berikut:
>
> (a) Lot 822 — RM24,000
> (b) Lot 829 — RM28,000
>
> Jumlah RM52,000
>
> Pihak pemegang gadaian meminta bayaran tersebut dibayar kepadanya kerana tuan tanah telah mencagarkan tanahnya kepada Bank Buruh.
>
> Nilai penilaian adalah seperti berikut:

(a) Lot 822 — RM60,642

(b) Lot 829 — RM71,125

Pihak pemegang gadaian bersetuju supaya nilaian persendirian yang berjumlah RM52,000 dibayar kepadanya manakala bakinya dibayar kepada tuan tanah.

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(Muhamad Fuad bin Hj Radzuan)

PERINTAH

Setelah menjalankan siasatan, saya mendapati bahawa semua tuan tanah tiada halangan untuk membenarkan tanah mereka di ambil balik untuk tujuan kawasan Perindustrian Mersing oleh PKENJ.

Dari segi bayaran pampasan yang boleh dipertimbangkan pada amnya boleh dibahagikan kepada beberapa jenis bayaran pampasan iaitu lapisan depan (tepi jalan raya), lapisan tengah dan lapisan belakang.

Harga nilaian yang paling tinggi yang diberikan oleh Jabatan Penilaian ialah RM34,000 seekar (kecuali Lot 808 yang dinilaikan berdasarkan bayaran pindahmilik). Dalam kes pengambilan balik tanah oleh Jabatan Pengairan dan Saliran yang dibicarakan pada 21 Disember 1992, harga nilaian yang diputuskan ialah RM34,000 seekar. Tanah ini letaknya lebih jauh daripada bandar, kira-kira ½km daripada tanah yang diambil oleh PKENJ dan harganya pada dasarnya lebih tinggi daripada tanah tersebut.

Bagi tanah Lot 822 dan Lot 829, yang telah digadaikan kepada Bank Buruh, bayaran pampasan kepada pemegang gadaian akan dibayar mengikut tuntutan di dalam laporan nilaian persendirian dan bakinya akan dibayar kepada pemilik tanah.

Berdasarkan di atas sebab-sebab yang telah diperjelaskan di atas, saya, Muhamad Fuad bin Hj Radzuan, Penolong Pentadbir Tanah Mersing, memerintahkan supaya bayaran pampasan dibayar sepertimana berikut:

Lot 822 EMR 351 seluas 2a 2r 19p, nilaian seekar RM25,000. Jumlah pampasan ialah RM66,718.75.

Bagi Lot 829 EMR 385 seluas 3a Or 13p, nilaian seekar RM25,000. Jumlah pampasan ialah RM77,031.25.

Dibayar kepada pemegang gadaian (Bank Buruh (M) Bhd) mengikut tuntutan penilai persendirian (Param & Associates) di atas fail V92/KLU/301. Bayaran tersebut masing-masing dengan nilaian RM24,000 (Lot 822) dan RM28,000 (Lot 829) untuk keseluruhan tanah.

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(Muhamad Fuad bin Hj Radzuan)

24 Oktober 1993

The notes of evidence recorded by the collector showed that the plaintiff chargee was represented by Mr Thamil Chelevan a/l Suppiah, a practising solicitor, who agreed that the private valuation of RM52,000 prepared by Messrs Param & Associates be paid to the plaintiff chargee while the balance sum to be paid to the chargor. It was because of this magnanimous concession by Mr Thamil Chelevan a/l Suppiah that the collector made an

order to that effect. The collector affirmed an affidavit on 27 November 1996 as reflected in encl 12 and there he deposed to what had transpired at the enquiry. The affidavit of the collector makes for interesting reading and it shows the reality of the matter. It was worded thus:

> 6 Saya sesungguhnya percaya bahawa apa yang telah saya rekodkan adalah keterangan-keterangan yang telah diberikan oleh pihak-pihak yang terlibat kepada saya semasa siasatan tersebut dijalankan.
>
> 7 Saya sesungguhnya percaya bahawa En Thamil Chelevan a/l Suppiah sebagai wakil plaintif dan juga pemegang gadaian telah menyatakan dan memaklumkan bahawa nilai atau taksiran bagi kedua-dua lot tersebut adalah RM52,000; dan bahawa jumlah tersebut diberikan kepada plaintif dan bakinya dibayar kepada pemilik kedua-dua lot tersebut.
>
> 8 Saya sesungguhnya mempercayai bahawa taksiran yang diberikan oleh wakil plaintif tersebut adalah nilai pasaran semasa lot-lot tersebut dan tiada jumlah atau taksiran lain yang telah dikemukakan oleh wakil plaintif semasa siasatan tersebut dibuat.
>
> 9 Oleh kerana wakil plaintif telah bersetuju untuk menerima jumlah RM52,000, saya sesungguhnya percaya pembahagian award antara plaintif dengan tuan tanah tidak menyalahi undang-undang. Sesalinan Borang G iaitu Pemberian Bertulis Pampasan bertarikh 10 November 1993 dan Borang H iaitu Pemberitahu Pemberian dan Tawaran Pampasan bertarikh 10 November 1993 di lampir dan masing-masingnya ditanda sebagai eks 'MFR3', 'MFR4a' dan 'MFR4b'.

The short recital of the contents of the collector's affidavit left an indelible mark as to the truth of the notes of evidence of the enquiry as recorded by the collector. There was no allegation of mala fide on the part of the collector when he conducted the enquiry. It was argued by Mr Philip Nainan, the learned counsel for the plaintiff chargee, that Mr Thamil Chelevan a/l Suppiah had affirmed an affidavit in encl 13 and there he had denied that he had given his consent to the apportionment of the compensation award. In encl 13, Mr Thamil Chelevan a/l Suppiah deposed that at the enquiry before the collector, he had categorically stated that the valuation report prepared by Param & Associates was not meant to compute the valuation of the properties for acquisition but rather it was solely prepared to ascertain the reserve price for auction purposes. It was deposed in encl 13 that at the time of the enquiry, the debt of the borrower amounted to RM672,924.09 and this figure was faxed to Mr Thamil Chelevan a/l Suppiah by the plaintiff chargee. It was deposed further in encl 13 that Mr Thamil Chelevan a/l Suppiah denied that he had consented to the apportionment of the compensation award as reflected in the notes of evidence recorded by the collector and it was his stand that he had informed the collector that the plaintiff chargee would not agree to accept RM52,000 and that he needed time to revert to the plaintiff chargee on the matter. Mr Thamil Chelevan a/l Suppiah too deposed in encl 13 that he did not agree nor was he empowered to agree to the apportionment of the compensation award. It was his stand that the contents of the notes of evidence at the enquiry were not shown to him and he was thus surprised as to its contents. Of pertinence, Mr Philip Nainan argued that no one

could possibly consent to a nullity, not even Mr Thamil Chelevan a/l Suppiah. Finally, Mr Philip Nainan submitted that in the face of a colossal debt, the plaintiff chargee would not have instructed their solicitors to agree to an apportionment of the compensation award.

Mr Nazaruddin bin Mohd Shariff, the assistant general manager of the plaintiff chargee, affirmed an affidavit on 5 March 1997 in encl 14 and there he deposed, inter alia, that Mr Tamil Chelevan a/l Suppiah had, on 23 August 1993, requested for the latest statement of account of the borrower and sought that the latest outstanding balance be faxed to him. Mr Nazaruddin bin Mohd Shariff complied and faxed on the morning of 24 August 1993 the latest account of the borrower to Mr Thamil Chelevan a/l Suppiah as the latter wanted to take it to the enquiry. A copy of the fax and a copy of the statement of account were exhibited as 'NMS1' and there the outstanding debt showed the staggering figure of RM672,924.09. It was deposed that the defendant knew about the existence of the debt as early as 29 September 1985. It was deposed that prior to the enquiry on 23 and 24 August 1993 by the defendant, the plaintiff chargee forwarded a new valuation report dated 3 August 1993 which showed the market value of the properties to be RM175,000. That valuation report was said to be prepared specifically for the purpose of the acquisition. But to whom that valuation report was sent to was not adverted to at all. It was deposed that on 24 August 1993, the defendant awarded RM143,750 and this amount was increased by the acquisition judge by a sum of RM31,250 thus making a grand total of RM175,000. It was the stand of the plaintiff chargee as reflected in encl 14 that there was no basis whatsoever for the defendant to hold onto the notion that the valuation report meant for auction could be used for acquisition purposes. It was also said that there was no basis for the defendant to apportion the compensation money between the chargor and the chargee bank in the face of the huge debt owed by the borrower at the material time.

Several observations must be made in regard to the enquiry, particularly, the notes of evidence recorded at the enquiry by the collector. Firstly, nothing was recorded to show that the colossal debt incurred by the chargor amounted to RM672,924.09. Secondly, though the collector was made to understand that the properties had been charged or mortgaged to the plaintiff and that the properties were subject to auction sales, yet no evidence was adduced to show that the debt to the plaintiff was growing bigger. Thirdly, at the enquiry, no other valuation report was produced — only the valuation report of Param & Associates was mentioned and noted by the collector. Fourthly, the statement of account showing the debt to be in the region of RM672,924.09 that was faxed to Mr Thamil Chelevan a/l Suppiah was not stated in the collector's notes and, consequently, it can be inferred that it was not shown to the defendant. Fifthly, Mr Thamil Chelevan a/l Suppiah who acted as counsel for the plaintiff at the enquiry had agreed to the apportionment. This brings me to the crucial question of a retainer of a solicitor particularly the nature and duration thereof. In the case of litigation, the retainer may be said to be entire or wholesome. The retainer is an entire contract — a contract to do certain business and

to be remunerated on completion of the assignment: *Saffron Walden Second Benefit Building Society v Rayner* (1880) 14 Ch D 406 (CA). Thus, if a solicitor withdraws without justification, he would not be paid as the principle of quantum merit would not apply: *Wild v Simpson* [1919] 2 KB 544 (CA) at p 566, per Atkin LJ. Now, the solicitor's authority to act for his client arises from his retainer and this would extend to transacting the business for his client. The relationship of a solicitor with his client is said to be an agent-principal affair. As an agent, the solicitor's authority must be limited by an agreement, express or implied, with his principal. Thus, in *Wright v Pepin* [1954] 2 All ER 52 where the solicitor there though not expressly authorized to acknowledge a mortgage debt, had authority to put his client's affairs in order and in so doing could properly acknowledged debt. By way of an analogy, Mr Thamil Chelevan a/l Suppiah was also authorized by the plaintiff chargee to put his client's affairs in order when he appeared at the enquiry. This must be so for otherwise he would not have appeared before the enquiry. If it was true that Mr Thamil Chelevan a/l Suppiah received a fax from the plaintiff chargee in regard to the huge debt of RM672,924.09, why was this fact not relayed to the collector during the enquiry? If this fact was relayed, the collector would surely have recorded it in his notes. It must be remembered that utterances by solicitors will be taken seriously as solicitors have the mandate to act for their clients. *Swinfen v Swinfen* (1857) 24 Beav 549 at pp 562–563 lays down a simple proposition of law which aptly applies to the present case. It is this. Where the parties are of full age and capacity, the court in practice accepts the statement of counsel that the terms are agreed and does not require any inquiry as to authority or a lengthy recapitulation of the facts. Thus, the collector sitting in his capacity as such under s 12 of the LAA must accept as gospel truth of what Mr Thamil Chelevan a/l Suppiah said particularly when he agreed that RM52,000 should go to the plaintiff and the balance to the chargor. What can the collector do in the face of this consent by the solicitor? Must the collector ignore the solicitor and not give that solicitor due credence? Estoppel would certainly be invoked against Mr Thamil Chelevan a/l Suppiah. Lord Denning described the general principles of estoppel in *Moorgate Mercantile Co Ltd v Twitchings* [1976] 1 QB 225 at p 241 in these words:

> Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.

After referring to O 18 rr 7(1) and 8(1) of the RHC, Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 especially at p 341 observed:

> In our judgment, the requirement of these rules is sufficiently met if the material facts giving rise to the estoppel are sufficiently pleaded without actually using the term 'estopped'. (See *Lal Somnath Singh & Ors v Ambika Prasad* AIR 1950 All 121 at p 131). It may be desirable for a pleader to use that term; but it is not fatal if he does not. One must not lose sight of the

> object of modern pleadings which is to prevent surprise and to enable disputes to be litigated in an orderly fashion: *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308 at p 320.

At p 344 of the same judgment, his Lordship spoke of the wide perspective wherein the doctrine of estoppel would apply. This was what his Lordship said:

> The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

In my judgment, the factual situation in the present case would accommodate the doctrine of estoppel to the benefit of the defendant. Material facts giving rise to the doctrine appeared in the affidavit of the collector and this court must give effect to it. As a sword estoppel would certainly cut through the fortress of the plaintiff, so to speak, and render Mr Thamil Chelevan a/l Suppiah bound by whatever he said to the collector at the enquiry. The message must be delivered to the effect that solicitors should be cautious and must guard the interests of their clients zealously lest they be open to negligence suits. *Rondel v Worsley* [1969] 1 AC 191 is a classic example of a barrister having to answer a negligence suit. In that case, the respondent barrister defended the appellant on a criminal assault charge. The appellant was convicted and being unhappy, he brought a negligence suit against the respondent barrister and alleged that the latter had been negligent in undertaking and preparing the defence. The appellant alleged that the respondent barrister failed, inter alia, to reveal and prove that the alleged victim's wounds were not caused by a knife and that the appellant was not in the habit of using a knife. Briefly, the allegations revolved on the failure to put certain questions to the witnesses and failure to call certain material witnesses. The House of Lords agreed with the Court of Appeal that no reasonable cause of action was disclosed, thus affirming the rule that spanned for almost 200 years to the effect that barristers were immune to negligence suits. But a caveat should be imposed. *Rondel v Worsley* must be read in the context that, in England, the legal profession was not fused. It had divisions of barristers and solicitors. Here, it is a fused profession and the set of facts in *Rondel v Worsley* if decided in our courts may yield different results. On the other end of the scale is the case of *Saif Ali & Anor v Sidney Mitchell & Co (A Firm) & Ors* [1980] AC 198 where the House of Lords held that the barrister was negligent when there was a failure to advise that Mrs Saif Ali or the van driver be joined as defendants. Be that as it may, I do not propose to say anything more in regard to the issue of a solicitor's immunity.

On the facts, *Chung Khiaw Bank Ltd* can certainly be distinguished. I have no hesitation to believe the collector when he deposed in his affidavit in encl 12 that what transpired at the enquiry can be seen in his notes of evidence. I repeat mala fide was not alleged against the collector.

A Vested with a statutory power under s 12 of the LAA, it is my judgment that the collector had performed his duty admirably and beyond reproach. No doubt a charge is indivisible and the total compensation sum should rightly go to the plaintiff but in the face of a concession by the solicitor acting for the plaintiff, what the collector did was perfectly above board and beyond reproach. The evidence speaks for itself. The factual matrix supports the defendant totally. The only remedy left is for the plaintiff chargee to proceed against the chargor. I have no hesitation in dismissing encl 3 with costs.

Application dismissed.

Reported by Zahid Taib